

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2741-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

RONALD PIERNER,

PLAINTIFF-APPELLANT,

v.

**COMPUTER RESOURCES AND TECHNOLOGY, INC.,
FIRSTSTAR BANK, N.A.,**

DEFENDANTS,

WAUKESHA STATE BANK,

DEFENDANT-RESPONDENT,

**WISCONSIN DEPARTMENT OF REVENUE, UNITED STATES
OF AMERICA, AS INTERNAL REVENUE SERVICE,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County:

MARIANNE E. BECKER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Ronald Pierner has appealed from a summary judgment determining that a mortgage held by the respondent, Waukesha State Bank (WSB), which secured a loan to Computer Resources and Technology, Inc. (CRT), was entitled to first priority over a similar mortgage held by Pierner. The trial court granted judgment in favor of WSB based on equitable subrogation. Pursuant to this court's order of October 14, 1997, and a presubmission conference, the parties have submitted memorandum briefs. Upon review of those memoranda and the record, we affirm the judgment of the trial court.

Our review of the trial court's grant of summary judgment is de novo. See *Millen v. Thomas*, 201 Wis.2d 675, 682, 550 N.W.2d 134, 137 (Ct. App. 1996). Summary judgment is warranted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. See *id.* When, as here, both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues, although always subject to the rule that summary judgment may be granted only if no material issue of fact is presented by the parties' respective evidentiary facts. See *id.* at 682-83 and n.2, 550 N.W.2d at 137.

Applying these standards to the record, we conclude that the trial court properly granted summary judgment to WSB. Pierner argues that the trial court erred as a matter of law in failing to hold that his mortgage had priority over WSB's mortgage because it was recorded first. WSB argues that its mortgage is entitled to priority because the loan secured by it was given to pay off a loan made by First Wisconsin Bank of Waukesha (Firststar) to CRT in 1986. The Firststar loan

was secured by a mortgage which was recorded before Pierner received and recorded his mortgage in 1988, and had first priority over Pierner's mortgage.

Subrogation is an equitable doctrine designed to avoid unjust enrichment and may properly be applied whenever a person other than a mere volunteer pays a debt which in equity and good conscience should be satisfied by another. *See Rock River Lumber Corp. v. Universal Mortgage Co.*, 82 Wis.2d 235, 240-41, 262 N.W.2d 114, 116 (1978). Equitable, or legal, subrogation has its source in equity and arises solely by operation and application of equitable principles.¹ *See Wisconsin Patients Compensation Fund v. Wisconsin Health Care Liab. Ins. Plan*, 200 Wis.2d 599, 619, 547 N.W.2d 578, 585-86 (1996). It arises as a means of doing justice after a balancing of the equities of the case, *see Rock River*, 82 Wis.2d at 242, 262 N.W.2d at 117, requiring courts to apply equitable principles to the facts of the case, *see Schulte v. Frazin*, 176 Wis.2d 622, 628, 500 N.W.2d 305, 307 (1993).

The remedy of subrogation is highly favored and the courts are inclined to give it a liberal application. *See Jindra v. Diederich Flooring*, 181 Wis.2d 579, 599 n.11, 511 N.W.2d 855, 861 (1994). A lender will be granted subrogation when it advances money in reliance upon a justified expectation that it will have security equivalent to that which its advances have discharged, provided that no innocent third parties will suffer. *See Rock River*, 82 Wis.2d at 241, 262

¹ There are two types of subrogation, conventional (or contractual) subrogation and equitable subrogation. *See Jindra v. Diederich Flooring*, 181 Wis.2d 579, 601, 511 N.W.2d 855, 862 (1994). Equitable subrogation is also referred to as "legal" subrogation. *See Wisconsin Patients Compensation Fund v. Wisconsin Health Care Liab. Ins. Plan*, 200 Wis.2d 599, 619, 547 N.W.2d 578, 585-86 (1996).

N.W.2d at 117. Equity will treat such a transaction as equivalent to an assignment of the original security. *See id.*

The WSB loan was issued for the purpose of paying off the loan to Firststar. In doing so, WSB intended and expected that it would have the position of first priority, a position that it believed it held when it received a title insurance policy showing no other mortgages. Because WSB reasonably expected and intended that its mortgage would hold the same priority as was held by the Firststar mortgage it replaced, subrogation was warranted unless an innocent third party would suffer as a result. *Cf. id.* at 242-45, 262 N.W.2d at 117-19; ***Bank of Barron v. Gieseke***, 169 Wis.2d 437, 460-61, 485 N.W.2d 426, 434 (Ct. App. 1992).

In determining whether subrogation would be inequitable, the trial court was required to consider whether it would cut off the intervening rights of one who relied upon the extinguishment of the mortgage or who had innocently placed himself in a position of disadvantage and would be injured by application of the doctrine. *See Rock River*, 82 Wis.2d at 246, 262 N.W.2d at 119. In this case, Pierner's rights did not intervene because when he obtained his mortgage, the Firststar mortgage already existed and he was aware that his mortgage was subordinate to it. *See id.* at 246-47, 262 N.W.2d at 119; ***Bank of Barron***, 169 Wis.2d at 461, 485 N.W.2d at 434. Subrogation merely leaves him in the same position he was in when he took his mortgage, namely, in second position.

To now hold that Pierner's mortgage is entitled to first priority would provide him with a windfall which he had no basis to reasonably foresee would be his when he obtained and recorded his mortgage. Nothing in the record indicates that when Pierner took his mortgage he did so in the expectation that it would rise to top priority, or that he changed his position to his detriment in

reliance on a belief that his mortgage had risen to first priority. While Pierner argues that he could logically assume that the Firststar mortgage would someday be paid and that he would move to first position, this amounts to nothing more than a mere hope by Pierner that his position would improve. He did not pay off the Firststar mortgage himself and had no reasonable expectation that WSB or any other lender would satisfy the Firststar loan and mortgage without ascending to Firststar's priority position. This is particularly true here because if the title insurance company's search had revealed Pierner's mortgage to WSB, WSB could have simply taken an assignment of the Firststar mortgage and acquired top priority that way. Pierner thus had no reasonable expectation that he would move to first priority, either at the time he took his mortgage or at the time WSB satisfied the Firststar mortgage. Instead, when WSB paid off the Firststar mortgage, WSB could reasonably expect that it would occupy that position.

Pierner argues that he changed his position to his detriment by loaning CRT an additional \$25,000 in reliance on a belief that his mortgage would be in first priority position. However, the trial court record indicates that Pierner did no title search between the time he received his mortgage and the time he commenced this foreclosure action, and thus did not rely on the record to conclude that he had first priority. Furthermore, the \$25,000 note was unsecured, thus giving WSB's mortgage clear priority over it. Since WSB's mortgage had priority over it regardless of whether subrogation occurred, it cannot be said that any harm

suffered by Pierner as a result of making the \$25,000 loan resulted from a belief that his mortgage had first priority over WSB's mortgage.²

Pierner also argues that subrogation should be denied in this case because WSB may collect damages by suing the title insurance company for negligence based on its failure to inform WSB of Pierner's mortgage, while he has no such cause of action. However, even in cases of negligence by the party requesting subrogation, one who is not a volunteer is entitled to equitable subrogation in the absence of intervening equities. See *Home Owners' Loan Corp. v. Papara*, 241 Wis. 112, 120, 3 N.W.2d 730, 733 (1942). In this case, the equities favor WSB. There is no basis to conclude that Pierner was harmed by the negligence of the title insurance company because if the title insurance company had informed WSB of Pierner's mortgage, WSB would simply have taken an assignment of the Firststar mortgage, leaving Pierner in the identical position he was in when he recorded his mortgage and the identical position he is in under subrogation. In contrast, denying subrogation would give Pierner an unjustified windfall by putting him in a better position that he would have been in but for the title insurance company's negligence, while subjecting WSB to the expense and travail of bringing an action against the title insurance company.

The trial court therefore properly determined that in balancing the equities of this case, WSB is entitled to subrogation. Pierner is in no worse a

² Pierner's amended complaint and deposition testimony also indicate that the debt secured by Pierner's mortgage was more than \$2.7 million, while the value of the collateral securing it was worth no more than \$400,000. Consequently, the assets securing the original debt to Pierner provided no viable security for the \$25,000 loan even if Pierner believed it was second in priority only to his own mortgage. To the extent that making the \$25,000 loan was detrimental to him, the detriment cannot be said to have been caused by his alleged belief that his mortgage had first priority.

situation than he was in when he recorded his mortgage, and WSB is placed in the position it reasonably expected and intended to occupy when it satisfied the Firststar mortgage.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

